

**BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

**In the Matter of the Accusation
Against:**

MICHAEL PAUL KOSTY, M.D.

**Physician's and Surgeon's
Certificate No. G43511**

Respondent

Case No. 800-2017-031606

OAH No. 2018090323

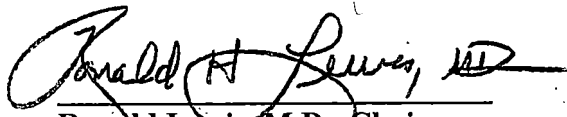
DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on April 19, 2019.

IT IS SO ORDERED: March 21, 2019.

MEDICAL BOARD OF CALIFORNIA



**Ronald Lewis, M.D., Chair
Panel A**

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PROPOSED DECISION

Abraham M. Levy, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on January 22 and 23, 2019, in San Diego, California.

Christine A. Rhee, Deputy Attorney General, represented complainant Kimberly Kirchmeyer, Executive Director of the Medical Board of California.

David Balfour, Attorney at Law, Nossaman LLP, represented respondent Michael Kosty, M.D., who was present.

The matter was submitted on January 23, 2019.

SUMMARY

Respondent was convicted of a crime substantially related to the qualifications, duties and functions of a physician and surgeon, he used alcohol in a manner that was dangerous to himself and to the public in violation of Business and Professions Code section 2239, subdivision (a), and he engaged in unprofessional conduct. Respondent showed that he is sufficiently rehabilitated and rebutted complainant's assertion that he is a substance abusing physician. Accordingly, a reasonable period of probation with specific terms and conditions will ensure public safety.

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FACTUAL FINDINGS

License History and Jurisdiction

1. On October 6, 1980, the board issued Physician's and Surgeon's Certificate Number G43511 to respondent. That certificate was in full force and effect at all times relevant to the charges brought herein and will expire on September 30, 2020, unless renewed. Respondent has no history of discipline.

2. On July 24, 2018, complainant filed the Accusation in her official capacity. The Accusation alleges that respondent was convicted on June 22, 2017, of a crime substantially related to the qualifications, functions, or duties of a physician due to his conviction, driving under the influence of alcohol, in violation of Vehicle Code section 23152, subdivision (b) (First Cause for Discipline); respondent used alcohol in a manner that was dangerous or injurious to the public or to himself in violation of Business and Professions Code section 2239, subdivision (a) (Second Cause for Discipline); and respondent engaged in unprofessional conduct (Third Cause for Discipline). Respondent timely filed a Notice of Defense.

Respondent's June 22, 2017 conviction

3. On June 22, 2017, in the Superior Court of California, County of San Diego, Case Number CN370013, captioned *The People of the State of California v. Michael Paul Kosty*, respondent was convicted, on his plea of guilty, of violating Vehicle Code section 23152, subdivision (a), driving under the influence of alcohol, a misdemeanor, with an enhancement of the penalty under Vehicle Code section 23578 because he had a blood alcohol concentration (BAC) of 0.16 percent, twice the legal limit. Respondent was placed on summary probation for five years, required to comply with the standard alcohol conditions which included not driving with any measurable amount of alcohol in his blood, enroll and complete a first offender alcohol program, complete the MADD program, attend three Alcoholics Anonymous meetings, perform 80 hours of community service at a non-profit organization, and pay fines totaling \$2,133. Respondent has complied with the terms of probation.

4. The facts and circumstances surrounding respondent's conviction are recorded in the San Diego County Sheriff's Department report¹ as follows: On February 4, 2017, at

¹ The report was received under *Lake v. Reed* (1997) 16 Cal.4th 448, 461-462, 464, which held that portions of a law enforcement officer's report are admissible in an administrative proceeding over a hearsay objection, including the reporting officer's percipient observations and the party's admissions. Under Government Code section 11513, subdivision (d), the admissible hearsay can support a factual finding, and the remaining hearsay statements (administrative hearsay) can be used to supplement or explain other evidence on which a factual finding can be made.

approximately 12:50 a.m., San Diego County Deputy Sheriff David Sanchez was dispatched to a reported hit and run. As he approached the scene, he observed respondent's black car heading in the opposite direction. He made a traffic stop of the car and contacted the driver, who was respondent's girlfriend at the time, Maria. Respondent was in the passenger side of the car. The Deputy smelled the strong odor of vomit and alcohol from inside the car. Maria made the spontaneous statement to the Deputy that respondent "made her switch seats after they hit the other vehicle." Her eyes were glassy and she smelled of alcohol. The Deputy had Maria exit the car and detained her in his patrol car while he interviewed respondent.

Respondent was sitting in the passenger side of the vehicle and had vomit on his shirt and vomit was running down the passenger side of the car. Respondent slurred his words as he spoke to the Deputy and the Deputy could smell the odor of alcohol and vomit coming from him. Respondent told the Deputy that he had two glasses of wine and last had a drink at 9:30 p.m. The Deputy had respondent submit to field sobriety tests, which respondent failed. He was unable to keep his balance during the One Leg Stand Test and the Walk and Turn Test. Respondent's eyes exhibited a lack of smooth pursuit and distinct jerkiness at maximum deviation and prior to 45 degrees under the Horizontal Gaze Nystagmus Test. Respondent submitted to a Preliminary Alcohol Screening (PAS) and at 1:28 a.m. he delivered breath samples of 0.157 and 0.162 percent BAC. The Deputy arrested respondent for driving under the influence of alcohol over the legal limit. After his arrest, a blood sample was taken from respondent at 2:30 a.m. at the Sheriff's Department substation. Respondent's BAC was 0.16 percent. Respondent did not dispute the laboratory test results of the blood sample.

During the course of his investigation, the Deputy interviewed the driver of the vehicle which respondent hit. The driver was an "Uber" driver, according to respondent's testimony. The driver told the Deputy that respondent "rear ended" him while he was at a traffic light, he saw respondent exit the driver's side of the car, he asked respondent for his insurance information, respondent refused to give him this information, Maria exited the car and got into the driver's seat. He and respondent began to argue and respondent got into the passenger side of the car and they left.

In his testimony at this hearing, respondent explained that after drinking at a restaurant with Maria from 7:30 p.m. to about midnight, they met people at the restaurant and went to their home. During this time, he estimated he drank a half bottle of wine and a gin and tonic and had a glass of wine at the home of one of the persons they met. Respondent felt "buzzed" and he decided to drive the approximate five miles from the restaurant to his home. While driving, Maria became sick and vomited, respondent became distracted, and he rear ended a car at a stop light. He said the impact caused no damage. The driver of the car, as noted, was a ride share Uber driver. This driver asked for respondent's insurance which respondent said he gave him. While they were exchanging information, respondent said several "large" friends of the driver came on to the scene, respondent feared for his safety, he got into the car with Maria driving and they left the scene. He emphasized that the reason he left was because he feared for his and Maria's personal safety.

Respondent's Evidence

RESPONDENT'S TESTIMONY

5. Respondent is Director of Thoracic Oncology at Scripps Green Cancer Center and Director of Graduate Medical Education at Scripps Clinic/Scripps Green Hospital, Division of Hematology and Oncology. Respondent graduated from medical school at George Washington University in 1979, completed an internship in internal medicine and a residency at the Naval Hospital in San Diego, was a Fellow in Hematology/Oncology at the Naval Hospital in San Diego, was a Visiting Fellow at the Dana-Farber Cancer Institute at Harvard Medical School and a Visiting Fellow/Research Associate at the Division of Hematology and Oncology at Scripps Clinic and Research Foundation. Respondent is board certified in internal medicine, and internal medicine with subspecialties in medical oncology and hematology. Since 2017, respondent has served on the Board of Directors of the American Society of Clinical Oncology (ASCO). Respondent has published numerous peer reviewed articles and abstracts in the field of oncology, made numerous presentations, and has been the principal investigator in research in a number of areas in the field of oncology.

In his testimony, respondent took responsibility for his conduct on February 4, 2017. He recognized that he made a very "bad, stupid decision" to drive when he had too much to drink, was remorseful, ashamed, embarrassed by his conduct, disappointed in himself and he understands that if this were to happen again it would have devastating professional consequences for him. As he stated, he should have taken a ride service like Uber or a cab. In the future he will not drink and drive. Respondent stated that his conduct was an aberration and he does not have an alcohol abuse problem. He said at the time of the incident his then girlfriend, Maria, had suggested that they go out. At the time, respondent was feeling "down in the dumps" because of personal problems his daughter was having, because of the deaths of six patients he was treating, and because February 6 was the birthdate of his father who had passed away in August 2016. They went to the restaurant, had dinner and sat at the bar. From about 7:30 p.m. to midnight, they were at the restaurant, met people and went to the home of one of these persons, as noted earlier. As also noted, he estimated he shared about a half bottle of wine and drank a gin and tonic. He said he drank more than he typically does that night.

Respondent testified that he drinks wine with dinner socially, he values good wine with dinner, and has a collection of about 2,000 bottles of wine. He said that prior to the DUI, he drank a glass of wine three to four times a week with dinner or when he went out. Since about Labor Day 2018, after the accusation was served upon him, respondent decided to give up drinking alcohol entirely to show that he is not dependent on alcohol to address the board's concerns regarding his conduct. He did not submit to urine screens to confirm that he was abstinent because, as he put it, he "is a straight arrow" and he will do what he says.

Respondent stated that he is fighting for his professional life and believes that restrictions on his license would serve to punish him. Considering his history as a doctor and his professional career, he does not think that restrictions should be placed on his license. Respondent is particularly concerned about the impact any license restrictions would have on his ability to practice medicine at Scripps because health care insurance plans may terminate their contracts with him if restrictions were imposed on him and he could lose the ability to treat his patients. Cigna has notified him in writing of the possibility that it may terminate its provider agreement with him. Respondent is also concerned that he could lose his hospital privileges. He cited a section from Scripps Health Medical Foundation's Policies and Procedures which requires that physicians maintain "good standing and an unrestricted license" as the basis of his concern. Also, respondent feared he could lose his leadership roles at Scripps and be removed from the Board of Directors of ASCO, the national organization for clinical oncologists, and he further could lose consulting agreements he has with Boehringer Ingelheim Pharmaceuticals, relating to research on medications to treat cancer, and Bristol-Myers Squibb Company, where he is a speaker at presentations to promote pharmaceuticals.

Respondent did not report his conviction to Scripps until he completed his re-credentialing application in December 2017. Under his contract with Scripps Clinic Medical Group, Inc., respondent was required to provide "prompt written notice of any action, pending or threatened, concerning any matter" which "may affect" his license to practice medicine or his staff privileges. He told his son, daughter and ex-wife. He did not tell colleagues because he felt ashamed.

Respondent attended therapy after his DUI arrest with David Lewis Christopher, a licensed marriage and family therapist, for relationship issues he was having at the time. He has found the sessions with Mr. Christopher useful and plans to continue seeing him. Mr. Christopher did not formally assess respondent for an alcohol abuse disorder. After the accusation was served on him, Mr. Christopher referred respondent for an evaluation to Kai MacDonald, M.D., a psychiatrist whom he knew through his work with persons in recovery.

Respondent's testimony was mostly credible. He presented as contrite, thoughtful, reflective about his conduct, and he sincerely stated he learned from his mistake and will not engage in the conduct again. However, his testimony that he left the scene of the accident on February 4, 2017, because he feared for his personal safety is looked at with suspicion and did not appear fully credible, especially given that he switched seats with Maria. His conduct is more reasonably explained by the fact that his judgment at the time was impaired.

TESTIMONY OF KAI McDONALD, M.D.

6. Kai MacDonald, M.D., is board certified in psychiatry and neurology and a member of the American Society of Addiction Medicine. He is on the faculty at the University of California San Diego (UCSD)'s Physician Assessment and Clinical Education Program (PACE) where he performs psychiatric fitness for duty examinations on referred physicians. Dr. McDonald is also Medical Director of the Lasting Recovery Outpatient

Substance Abuse Treatment Center. He has served as an assistant clinical professor at UCSD and is a part time clinician for students at the University of San Diego. He has been licensed to practice medicine since 1997.

As noted, respondent's therapist, Mr. Christopher, referred respondent to Dr. MacDonald to assess whether respondent has an alcohol use disorder. In conducting his evaluation, Dr. MacDonald reviewed a number of materials: the accusation filed in this matter which detailed the circumstances of respondent's DUI, the record of respondent's conviction, and labs from respondent's treating doctor for the last four years. He also interviewed respondent's ex-wife, Tony Kosty, and James Mason, M.D., who is head of Scripps Medical Group. In addition, he conducted a clinical interview of respondent and a mental status exam of him and he administered the following psychological tests on respondent: The Affective Temperament Scale, the ASRS which is a scale to measure attention deficit traits, Alcohol Use Disorder Inventory Test, CD-RISC-10 which is a measure of resiliency, Childhood Trauma Questionnaire, Generalized Anxiety Disorder questionnaire, Inventory of Interpersonal Problems, PHQ, a screen for depression, PSOQ which is a self-report measure that quantifies several personality traits and disorders based on the DSM-IV categories, Quality of Life Scale, Temperament & Character Inventory, and Young Schema Questionnaire.

Based on the information he obtained from these sources, his experience and relevant literature in the field, Dr. MacDonald concluded that respondent does not have an alcohol use disorder under the Diagnostic and Statistical Manual IV-TR (DSM-IV-TR).² Respondent met none of the criteria under the DSM for alcohol use disorder: respondent denied drinking alcohol in large amounts or for long periods of time; he denied wanting to cut down or stop using the alcohol or being unable to stop or cut back if he desired to limit himself. He denied spending a lot of time getting, using, or recovering from the use of alcohol. He denied cravings or urges to use alcohol. He denied not managing to do what he should do at work, home or school because of alcohol and he denied continuing to use alcohol when it causes problems in relationships. He denied giving up important social or occupational recreational activities because of alcohol use. He denied using alcohol again and again even when it puts him in danger. He denied continuing to use when he knows that he has a physical or psychological problem that could be caused by using alcohol. He denied needing to use more alcohol to reach a desired effect and he denied experiencing withdrawal symptoms.

Dr. MacDonald stressed that he did not rely solely on respondent's self-reporting for his opinion. Respondent's ex-wife and Dr. Mason, who has known respondent for 20 years, substantiated what respondent reported regarding his alcohol use over many years. In

² Dr. MacDonald stated in his report that he chose to use the DSM-IV-TR criteria in making his formal diagnosis, as opposed to the more recent DSM-5 criteria, because the "forensic and evaluation field appears unresolved" due to the elimination of the Global Assessment of Functioning Scale (GAF) under the DSM-5 and moving from a categorical, multi-axial system to a multidimensional, non-axial system. He stated that he would apply the DSM-5 diagnostic formulation upon request.

addition, labs of respondent taken over four years that Dr. MacDonald obtained from respondent's primary care doctor did not show that respondent had elevated liver enzymes or bone marrow abnormalities, which Dr. MacDonald said you would expect to see when someone drinks at a problem level. Dr. MacDonald also relied on the results of the mental status exam of respondent he conducted. Based on his clinical experience, he found respondent to be a credible historian. Dr. MacDonald did not see any evidence of the defensiveness or obfuscation or overt dissimulation that is often present when someone is attempting to minimize or cover up a substance abuse disorder.

Dr. MacDonald offered the further opinion that he did not believe that, in view of the fact that respondent does not have an even "near threshold level" alcohol use disorder, that ongoing biological monitoring is necessary.

Dr. MacDonald's testimony is fully credited. He testified in a clear manner and answered all questions posed to him without evasion. His opinions were well-supported by the evidence of record including Ms. Kosty's statement, Dr. Mason's testimony, and respondent's credible testimony.

TESTIMONY OF AMY DAY, M.D.

7. Amy Day, M.D., is Chief of Staff at Scripps Green Hospital, Division Head of General Surgery, and Chair of the Executive Committee. In her capacity as Chair of the Executive Committee, she deals with physician behavior issues and concerns about physician behavior.

Dr. Day has known respondent since she started working at Scripps in 2006 and has come to know him through committees she has served on with him including the Graduate Medical Education Committee, which he chairs. As a general surgeon, she also has shared numerous patients with respondent. Dr. Day described respondent's clinical care of patients as "outstanding" and she has high regard for his leadership abilities. In this regard, she noted specifically that recently, as a member of the Executive Committee, respondent formed a new working group to address physician well-being and "burn-out." Dr. Day added that as a leader in the hospital community, respondent has been passionate about supporting trainees and has encouraged female physicians to take on leadership roles, which she appreciates.

Dr. Day has read the accusation in this matter, is familiar with respondent's DUI, and discussed the incident with respondent. He told her that he was very embarrassed by it, it was a one-time occurrence, a mistake that he will not let happen again. Respondent presented to her as extraordinarily contrite. Respondent told her that he was abstinent from alcohol.

Dr. Day said that she had never had any concerns about respondent's alcohol use or that he excessively used alcohol, aside from the present incident. Over the years she has had the chance to interact with him at Scripps related social events and she never observed behavior out of the ordinary.

In answers to questions posed to her on cross examination, Dr. Day stated that respondent did not disclose his conviction in writing to her until she asked him to do so in August or September 2018. She noted, however, that in December 2017, in his credentialing application, respondent disclosed his conviction, but the conviction did not come to her attention through staff error until the accusation was filed in this matter. Dr. Day then contacted respondent in August 2018 to discuss it and at that point asked him to submit a letter in writing regarding the conviction.

In their conversation at that time, Dr. Day recommended to him that he set an appointment with the Physician Well-Being Committee at Scripps. She commented, however, that this committee was in a state of flux due to turnover, but respondent told her that he would be willing to meet with this committee. She said that the Credentialing Committee was apprised of the conviction.

TESTIMONY OF JAMES MASON, M.D.

8. James Mason, M.D., is Head of the Division of Hematology/Oncology at Scripps Clinic and Chairman of Medicine at Scripps Green Hospital. Dr. Mason is also Director, Blood and Marrow Transplant Program and Medical Oncology.

Dr. Mason has worked very closely with respondent for over 22 years at Scripps and has strong confidence in respondent's professional skills and personal character. He described him as an exemplary physician and said respondent helped bring Scripps's Thoracic Oncology program to national prominence and played a significant role in establishing the Scripps MD Anderson Cancer Center. He also stated that respondent is a trusted and valued colleague.

Over the years he has had the opportunity to attend many fundraising, networking, and social events with respondent where alcohol was served. At no time did Dr. Mason witness inappropriate or excessive alcohol consumption by respondent.

Dr. Mason is aware of the incident and in September 2018, he and Dr. Day, talked to respondent about it. At this meeting, respondent expressed his disappointment in himself, his embarrassment, and he said the incident was an aberration. Dr. Mason agrees with respondent that his DUI is an aberration. He believes the incident has profoundly impacted respondent and he has taken steps to ensure such an incident does not happen again.

Dr. Mason asked that the board not place respondent on probation and issue a reprimand to him.

TESTIMONY OF RICHARD HUGH WALKER, M.D.

9. Richard Hugh Walker, M.D., is President of Scripps Medical Group and Chair of the Medical Group. He has known respondent professionally for 25 years through

clinical, academic, medical group leadership and social activities and regards respondent as a friend.

Dr. Walker stated that respondent is nationally recognized as a member of the Board of Directors of the American Society of Clinical Oncology, which he described as the highest level of service in the field of oncology and the premier oncologic society. He said that respondent earned this position after years of service in clinical, educational, research, oversight and leadership positions. Dr. Walker has high regard for respondent's leadership skills and noted specifically that graduate medical education has grown through his leadership.

Dr. Walker is familiar with respondent's DUI conviction. Respondent told him, in August 2018, in his capacity as president of the medical group. His reaction was surprise. In all the years of knowing him, Dr. Walker has had no concerns about respondent's alcohol use or fitness while respondent performed at the highest level of the profession with integrity and he has never heard complaints about respondent in physician oversight committees. He continues to have full confidence in respondent. Dr. Walker added that the medical group has its own physician oversight committee and will evaluate respondent when and if respondent is disciplined.

TESTIMONY OF DAVID L. CHRISTOPHER, M.S., M.A.

10. Mr. Christopher is a licensed marriage and family therapist. He holds master's degrees in clinical psychology and counseling psychology, has been licensed as a therapist since 1993, and has been in private practice since that time. Prior to his licensure as a therapist, Mr. Christopher worked in the field of substance abuse recovery. He was a founding staff member of the McDonald Center for Drug and Alcohol Treatment at Scripps Memorial Hospital and Lead Interventionist at the McDonald Center. Through his practice, he works daily with persons with substance abuse issues and addictive disorders.

Mr. Christopher's testimony is summarized as follows and is supplemented by the letter he wrote on respondent's behalf dated October 3, 2018: He wanted to testify on respondent's behalf because he does not want to see respondent's license disciplined due to respondent's history as an accomplished doctor and his work with cancer patients. Mr. Christopher began treating respondent last spring to help him with his relationship with his now former girlfriend. Mr. Christopher meets with respondent weekly for 90 minute sessions. Respondent brought to his attention the accusation that was filed in this matter. Before he brought the accusation to his attention, Mr. Christopher was not aware of respondent's DUI and respondent did not express to him that he has a problem with alcohol. Respondent told Mr. Christopher that he was taken off guard by the filing of the accusation. He said he felt humiliation, shame and embarrassment, which Mr. Christopher said were appropriate, congruent responses and important because respondent was able to access his emotions.

Mr. Christopher did not do a "formal" assessment regarding whether respondent has an alcohol use disorder; regardless, he does not believe respondent has an alcohol use disorder per the 11 criteria under the DSM. For a formal assessment, Mr. Christopher referred respondent, as noted earlier, to Dr. MacDonald because of Dr. MacDonald's reputation in the field of substance abuse psychiatry and work at Lasting Recovery.

Since his DUI, Mr. Christopher said respondent's relationship with alcohol changed. He stopped drinking in September 2018, which Mr. Christopher said was not required clinically, and respondent became more cognizant of the impact his use of alcohol may have.

LETTERS OF SUPPORT

11. Respondent submitted letters of support from the following individuals: Amy Day, M.D., James Mason, M.D., Tony Kosty, Christopher Sichel, Andrew J. King, M.D., Gary W. Williams, M.D., and Richard H. Walker, M.D. The letters of Ms. Kosty, Mr. Sichel, Dr. King and Dr. Williams were received under Government Code section 11514 and their statements are considered as if they testified. Drs. Day, Mason, and Walker testified and the statements contained in their letters are incorporated in the summaries of their testimony, as detailed above.

In her letter dated September 18, 2019, Ms. Kosty, who is respondent's ex-wife, stated that she has known respondent since 1977 and described him as a very caring and very intelligent person who is committed to his family and to the practice of medicine. She stated that at no time during their marriage, or since she has known him, did she believe he had a substance abuse problem of any kind. Ms. Kosty stated that at the time of his DUI, he had recently lost both his parents and several patients and this may have contributed to his lack of judgment. She believes that respondent has learned his lesson and she asks that the board consider the DUI a one-time event in respondent's life and that he not be prevented from serving his patients as a widely respected doctor.

Mr. Sichel in his letter dated September 24, 2018, stated that he is the President and CEO of the Make-A-Wish Foundation of San Diego. He said that over the last several years he has interacted with respondent through events supporting the Foundation and when visiting children and their families. He described respondent as very thoughtful, personable and concerned for the well-being of the children and their families. He added that he believes that what makes respondent a successful doctor is that he is a thoughtful advocate who has a deep desire to heal. He is aware of respondent's DUI and respondent has expressed to him his remorse and commitment to not make the same mistake again. Mr. Sichel urges the board to not hinder respondent's ability to care for his patients.

Dr. King, in his letter dated September 6, 2018, stated that he is the Chief of Staff Elect at Green Hospital and Head of the Division of Nephrology. He has interacted frequently with respondent over the past 17 years in the context of patient care and hospital administration and on several occasions observed him in social settings. Dr. King described respondent as a "pillar of Scripps, the Division of Oncology, and the Graduate Medical

Education program.” He described respondent as a valued colleague and great mentor. As Chief of Staff Elect, he met with respondent to discuss the DUI and was impressed with his character and sincerity. Respondent was fully remorseful, took full responsibility for his conduct, modified his lifestyle, is now abstinent, fully complied with the terms of his probation, and sought counseling to understand the stressors that made him vulnerable to the incident. Dr. King added that based on his knowledge of respondent over 17 years, he never thought he had a substance abuse problem and does not believe he has one now. Dr. King believes that the incident was an aberrant one-time event.

Dr. Williams, in his letter dated September 23, 2018, stated that he is the Chairman of the Department of Medicine and a member of the Graduate Medical Education Committee at Scripps Clinic Medical Group. He is also the Vice President, Medicine Services, at Scripps Clinic. Dr. Williams described respondent as a distinguished member of Scripps Clinic Medical Group through his clinical, teaching and research contributions. He said that respondent is recognized for his care of patients with cancer and his devotion to his patients for his efforts to improve their lives and improve their clinical outcomes through his clinical work and research. He said that he met respondent and discussed the DUI. Dr. Williams stated that respondent is truly remorseful and he expressed his apologies, his embarrassment regarding the incident and his commitment to sobriety. Respondent, Dr. Williams noted, has taken advantage of professional counseling. Dr. Williams added that Scripps Clinic and Scripps Clinic Medical Group will “continue to support his positions in Graduate Medical Education leadership, research and patient care.” He further added that “we are available to provide any and all assistance needed.”

The Parties' Arguments

12. Complainant asked that respondent be placed on probation for three years, which represents a departure from the board’s disciplinary guidelines for a substantially related conviction and conduct involving the abuse of alcohol. Complainant further asked that terms and conditions of probation include biological fluid testing, substance abuse support meetings, psychological therapy, a worksite monitor and the successful completion of an ethics course.

Respondent argued that no discipline should be imposed because respondent showed that he does not pose a threat to the public. If discipline is to be imposed, respondent asked for a public reprimand. Respondent argued, further, per Dr. MacDonald’s testimony that any discipline need not include biological fluid testing or monitoring.

LEGAL CONCLUSIONS

Applicable Law Regarding Causes for Discipline

1. The standard of proof applied in this proceeding is clear and convincing evidence to a reasonable certainty.

2. The board may take disciplinary action against a doctor who engages in unprofessional conduct. (Bus. & Prof. Code, § 2234.) The conviction of an offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct. (Bus. & Prof. Code, § 2236, subd. (a).)

3. Business and Professions Code section 2227 provides as follows:

(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:

(1) Have his or her license revoked upon order of the board.

(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.

(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.

(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the board and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1.

4. Business and Professions Code section 2239, subdivision (a), provides:

The use or prescribing for or administering to himself or herself, of any controlled substance; or the use of any of the

dangerous drugs specified in Section 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or injurious to the licensee, or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely or more than one misdemeanor or any felony involving the use, consumption, or self-administration of any of the substances referred to in this section, or any combination thereof, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct.

5. California Code of Regulations, title 16, section 1360, provides that a crime or act is substantially related to the qualifications, functions, or duties of a physician and surgeon if to a substantial degree it evidences present or potential unfitness to perform the functions of a physician and surgeon.

Case Law Regarding Unprofessional Conduct

6. In *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 575, the appellate court noted that “unprofessional conduct” as that term was used in Business and Professions Code section 2361 (now section 2234), included certain enumerated conduct. (*Id.* at p. 575.) The court further stated (*Ibid.*):

This does not mean, however, that an overly broad connotation is to be given the term “unprofessional conduct;” it must relate to conduct which indicates an unfitness to practice medicine. [Citations.] Unprofessional conduct is that conduct which breaches the rules or ethical code of a profession, or conduct which is unbecoming a member in good standing of a profession. [Citation.]

Disciplinary Guidelines

7. The Medical Board’s 2016 (12th Edition) “Manual of Model Disciplinary Orders and Disciplinary Guidelines” provides a recommended penalty range for violations of the Medical Practices Act. For the excessive use of alcohol, the recommended minimum penalty is five years’ probation with a maximum penalty of revocation; for a crime substantially related to the qualifications, functions, or duties of a physician and surgeon the recommended penalty is five years’ probation.

In 2015, the board adopted the Uniform Standards for Substance Abusing Licensees under California Code of Regulations, title 16, sections 1361 and 1361.5.

8. California Code of Regulations, title 16, section 1361, provides in part:

(a) In reaching a decision on a disciplinary action under the Administrative Procedure Act (Government Code section 11400 et seq.), the Medical Board of California shall consider the disciplinary guidelines entitled "Manual of Model Disciplinary Orders and Disciplinary Guidelines" (11th Edition/2011) which are hereby incorporated by reference. Deviation from these orders and guidelines, including the standard terms of probation, is appropriate where the Board in its sole discretion determines by adoption of a proposed decision or stipulation that the facts of the particular case warrant such a deviation – for example: the presence of mitigating factors; the age of the case; evidentiary problems.

(b) Notwithstanding subsection (a), the Board shall use the Uniform Standards for Substance-Abusing Licensees as provided in section 1361.5, without deviation, for each individual determined to be a substance-abusing licensee. . . .

9. California Code of Regulations, title 16, section 1361.5, provides in part:

(a) If the licensee is to be disciplined for unprofessional conduct involving the use of illegal drugs, the abuse of drugs and/or alcohol, or the use of another prohibited substance as defined herein, the licensee shall be presumed to be a substance-abusing licensee for purposes of section 315 of the Code.

(b) Nothing in this section shall prohibit the Board from imposing additional terms or conditions of probation that are specific to a particular case or that are derived from the Board's disciplinary guidelines referenced in section 1361 that the Board determines is necessary for public protection or to enhance the rehabilitation of the licensee.

(c) The following probationary terms and conditions shall be used without deviation in the case of a substance-abusing licensee: (1) Clinical Diagnostic Evaluations and Reports; [¶] (2) Notice of Employer or Supervisor Information; [¶] (3) Biological Fluid Testing; [¶] (4) Group Support Meetings; [¶] (5) Worksite Monitor Requirements and Responsibilities; [¶] and (6) The licensee must remain in compliance with all terms and conditions of probation. . . .

10. Respondent established that he is not a substance abusing physician, and thereby rebutted the presumption under California Code of Regulations, title 16, section 1361.5. Dr. MacDonald credibly testified that respondent does not have even a “threshold” substance abuse disorder based on his assessment of respondent. His opinion was well-supported by the results of psychological assessments he administered to respondent, a mental health assessment he performed, lab results he obtained from respondent’s primary care physician, and his interview with respondent’s ex-wife and Dr. Mason. Respondent credibly, in turn, testified that he does not have an alcohol use disorder. His testimony was also substantiated by Ms. Kosty’s declaration, the declarations of others who have known him over the years, and Dr. Mason’s testimony.

First Cause for Discipline

11. Cause exists under Business and Professions Code section 2236, subdivision (a), to take disciplinary action against respondent’s license. Respondent’s single alcohol-related conviction evidences, to a substantial degree, a present or potential unfitness to practice medicine in a manner consistent with the public health, safety or welfare. The facts and circumstances of respondent’s February 4, 2017 DUI indicate that respondent displayed poor judgment when he drove with a BAC level over twice the legal limit, and then, after he hit another car, he left the scene of the accident with his impaired girlfriend driving the car.

Second Cause for Discipline

12. Cause exists under Business and Professions Code section 2239, subdivision (a), to impose discipline against respondent’s license. Respondent used alcoholic beverages “in such a manner as to be dangerous. . . to the licensee, or to any other person or to the public. . . .” (Bus. & Prof. Code, § 2239, subd. (a).) On February 4, 2017, respondent drove a car when he had a BAC over twice the legal limit. Respondent was an impaired driver and unable to drive safely. As a result of his impairment, he hit another car.

Third Cause for Discipline

13. Cause exists under Business and Professions Code 2234 to impose discipline against respondent’s license for general unprofessional conduct. By using alcohol in a manner that was dangerous to himself and to others, respondent engaged in general unprofessional conduct. Respondent’s conduct was unbecoming for a member in good standing of the medical profession. (*Shea, supra*, 81 Cal.App.3d at p. 575.)

Evaluation of the Degree of Discipline and Disposition

14. The purpose of an administrative proceeding seeking the revocation or suspension of a professional license is not to punish the individual; the purpose is to protect the public from dishonest, immoral, disreputable or incompetent practitioners. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.) The determination

whether respondent's license should be revoked or suspended includes an evaluation of the rehabilitation and mitigation factors contained in the statutes and the board's guidelines.

Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve one who has achieved "reformation and regeneration." (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) Fully acknowledging the wrongfulness of past actions is an essential step towards rehabilitation. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 940.) The mere expression of remorse does not demonstrate rehabilitation. A truer indication of rehabilitation will be presented if a petitioner can demonstrate by sustained conduct over an extended period of time that she is rehabilitated and fit to practice. (*In re Menna* (1995) 11 Cal.4th 975, 987, 991.) The evidentiary significance of misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) Cal.3d 1061, 1070.)

After giving due consideration to the board's guidelines, the case law concerning rehabilitation, and the evidence submitted in this matter, it is determined that a departure from the board's recommended five-year period of discipline is warranted. A three-year period of probation with specific terms and conditions will ensure public protection. Respondent's request that a public reprimand be issued is denied.

This conclusion is based on the following evidence of record: Respondent's conduct and conviction are not remote in time and represented a serious lack of judgment. He is on criminal probation through June 2022.³ At the same time, respondent fully acknowledged his poor judgment and credibly offered meaningful insight into why he drank to excess on February 4, 2017. As found above, respondent is not a substance abusing licensee. His abuse of alcohol on February 4, 2017, does not represent a danger to his patients. Respondent, further, continues to have the confidence of leaders in the Scripps medical community: Drs. Day, Mason and Walker. Over the course of his long and distinguished medical career, respondent has no prior discipline. His conduct appeared to have been an isolated event.

In addition to a departure from the term of probation, a further departure is warranted from the terms and condition of probation recommended for respondent's conduct. No public purpose would be served to require that respondent submit to biological fluid testing, that he attend support groups or that he have a worksite monitor. Dr. MacDonald credibly testified, as found earlier, that respondent does not have an even "near threshold" alcohol abuse disorder that would trigger the need for him to submit to such terms and conditions. Thus, requiring him to undergo testing, or requiring that he attend support groups or have a worksite monitor would serve no purpose and would amount to impermissible punishment. (*Ettinger, supra*, 135 Cal.App.3d at p. 856.)

³ Since persons under the direct supervision of judicial or correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that such an individual did not commit additional crimes or continue inappropriate behavior while under supervision. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

With this noted, respondent will be required to continue to undergo psychotherapy and take and complete a professionalism course.

ORDER

Physician's and Surgeon's Certificate Number G 43511 issued to respondent Michael Paul Kosty, M.D., is revoked. However, the revocation is stayed, and respondent is placed on probation for three years upon the following terms and conditions:

1. Professionalism Program (Ethics Course)

Within 60 calendar days of the effective date of this Decision, respondent shall enroll in a professionalism program, that meets the requirements of Title 16, California Code of Regulations (CCR) section 1358.1. Respondent shall participate in and successfully complete that program. Respondent shall provide any information and documents that the program may deem pertinent. Respondent shall successfully complete the classroom component of the program not later than six (6) months after respondent's initial enrollment, and the longitudinal component of the program not later than the time specified by the program, but no later than one (1) year after attending the classroom component. The professionalism program shall be at respondent's expense and shall be in addition to the Continuing Medical Education (CME) requirements for renewal of licensure.

A professionalism program taken after the acts that gave rise to the charges in the Accusation, but prior to the effective date of the Decision may, in the sole discretion of the Board or its designee, be accepted towards the fulfillment of this condition if the program would have been approved by the Board or its designee had the program been taken after the effective date of this Decision.

2. Psychotherapy

Within 60 calendar days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval the name and qualifications of a California-licensed board certified psychiatrist or a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. Upon approval, respondent shall undergo and continue psychotherapy treatment, including any modifications to the frequency of psychotherapy, until the Board or its designee deems that no further psychotherapy is necessary.

The psychotherapist shall consider any information provided by the Board or its designee and any other information the psychotherapist deems relevant and shall furnish a written evaluation report to the Board or its designee. Respondent shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent.

Respondent shall have the treating psychotherapist submit quarterly status reports to the Board or its designee. The Board or its designee may require respondent to undergo psychiatric evaluations by a Board-appointed board certified psychiatrist. If, prior to the completion of probation, respondent is found to be mentally unfit to resume the practice of medicine without restrictions, the Board shall retain continuing jurisdiction over respondent's license and the period of probation shall be extended until the Board determines that respondent is mentally fit to resume the practice of medicine without restrictions.

Respondent shall pay the cost of all psychotherapy and psychiatric evaluations.

3. Notification

Within seven (7) days of the effective date of this Decision, the respondent shall provide a true copy of this Decision and Accusation to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Board or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

4. Supervision of Physician Assistants and Advanced Practice Nurses

During probation, respondent is prohibited from supervising physician assistants and advanced practice nurses.

5. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

6. Quarterly Declarations

Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

7. General Probation Requirements

Compliance with Probation Unit

Respondent shall comply with the Board's probation unit.

Address Changes

Respondent shall, at all times, keep the Board informed of respondent's business and residence addresses, email address (if available), and telephone number. Changes of such addresses shall be immediately communicated in writing to the Board or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Place of Practice

Respondent shall not engage in the practice of medicine in respondent's or patient's place of residence, unless the patient resides in a skilled nursing facility or other similar licensed facility.

License Renewal

Respondent shall maintain a current and renewed California physician's and surgeon's license.

Travel or Residence Outside California

Respondent shall immediately inform the Board or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

In the event respondent should leave the State of California to reside or to practice respondent shall notify the Board or its designee in writing 30 calendar days prior to the dates of departure and return.

8. Interview with the Board or its Designee

Respondent shall be available in person upon request for interviews either at respondent's place of business or at the probation unit office, with or without prior notice throughout the term of probation.

9. Non-practice While on Probation

Respondent shall notify the Board or its designee in writing within 15 calendar days of any periods of non-practice lasting more than 30 calendar days and within 15 calendar

days of respondent's return to practice. Non-practice is defined as any period of time respondent is not practicing medicine as defined in Business and Professions Code sections 2051 and 2052 for at least 40 hours in a calendar month in direct patient care, clinical activity or teaching, or other activity as approved by the Board. If respondent resides in California and is considered to be in non-practice, respondent shall comply with all terms and conditions of probation. All time spent in an intensive training program which has been approved by the Board or its designee shall not be considered non-practice and does not relieve respondent from complying with all the terms and conditions of probation. Practicing medicine in another state of the United States or Federal jurisdiction while on probation with the medical licensing authority of that state or jurisdiction shall not be considered non-practice. A Board-ordered suspension of practice shall not be considered as a period of non-practice.

In the event respondent's period of non-practice while on probation exceeds 18 calendar months, respondent shall successfully complete the Federation of State Medical Board's Special Purpose Examination, or, at the Board's discretion, a clinical competence assessment program that meets the criteria of Condition 18 of the current version of the Board's "Manual of Model Disciplinary Orders and Disciplinary Guidelines" prior to resuming the practice of medicine.

Respondent's period of non-practice while on probation shall not exceed two (2) years.

Periods of non-practice will not apply to the reduction of the probationary term.

Periods of non-practice for a respondent residing outside of California, will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; General Probation Requirements; Quarterly Declarations; Abstain from the Use of Alcohol and/or Controlled Substances; and Biological Fluid Testing.

10. Completion of Probation

Respondent shall comply with all financial obligations (e.g., restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon successful completion of probation, respondent's certificate shall be fully restored.

11. Violation of Probation

Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Board shall have

continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.


12. License Surrender

Following the effective date of this Decision, if respondent ceases practicing due to retirement or health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request to surrender his or her license. The Board reserves the right to evaluate respondent's request and to exercise its discretion in determining whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Board or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation. If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

13. Probation Monitoring Costs

Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Board, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Board or its designee no later than January 31 of each calendar year.

DATED: February 20, 2019.

DocuSigned by:

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ABRAHAM M. LEVY
Administrative Law Judge
Office of Administrative Hearings

1 XAVIER BECERRA
Attorney General of California
2 ALEXANDRA M. ALVAREZ
Supervising Deputy Attorney General
3 CHRISTINE A. RHEE
Deputy Attorney General
4 State Bar No. 295656
600 West Broadway, Suite 1800
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 738-9455
7 Facsimile: (619) 645-2061

8 *Attorneys for Complainant*

FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO JULY 24 2018
BY [Signature] ANALYST

10 BEFORE THE
11 MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
12 STATE OF CALIFORNIA

13 In the Matter of the Accusation Against:

Case No. 800-2017-031606

14 MICHAEL PAUL KOSTY, M.D.
10666 N. Torrey Pines Road, MS 217
15 La Jolla, CA 92037

ACCUSATION

16 Physician's and Surgeon's Certificate
17 No. G43511,

Respondent.

19 Complainant alleges:

21 PARTIES

22 1. Kimberly Kirchmeyer (Complainant) brings this Accusation solely in her official
23 capacity as the Executive Director of the Medical Board of California.

24 2. On or about October 6, 1980, the Medical Board issued Physician's and Surgeon's
25 Certificate Number G43511 to Michael Paul Kosty, M.D. (Respondent). Physician's and
26 Surgeon's Certificate No. G43511 was in full force and effect at all times relevant to the charges
27 brought herein and will expire on September 30, 2018, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 2227 of the Code states, in pertinent part:

“(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the board, may, in accordance with the provisions of this chapter:

“(1) Have his or her license revoked upon order of the board.

“(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the board.

“(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the board.

“(4) Be publicly reprimanded by the board. The public reprimand may include a requirement that the licensee complete relevant educational courses approved by the board.

“(5) Have any other action taken in relation to discipline as part of an order of probation, as the board or an administrative law judge may deem proper.

“...”

5. Section 2234 of the Code states, in pertinent part:

“The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

“(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

“...”

1 6. Unprofessional conduct under Business and Professions Code section 2234 is conduct
2 which breaches the rules or ethical code of the medical profession, or conduct which is
3 unbecoming to a member in good standing of the medical profession, and which demonstrates an
4 unfitness to practice medicine. (*Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,
5 575.)

6 7. Section 2236 of the Code states:

7 “(a) The conviction of any offense substantially related to the qualifications,
8 functions, or duties of a physician and surgeon constitutes unprofessional conduct
9 within the meaning of this chapter [Chapter 5, the Medical Practice Act]. The record of
10 conviction shall be conclusive evidence only of the fact that the conviction occurred.

11 “...

12 “(d) A plea or verdict of guilty or a conviction after a plea of nolo contendere is
13 deemed to be a conviction within the meaning of this section and Section 2236.1. The
14 record of conviction shall be conclusive evidence of the fact that the conviction
15 occurred.”

16 8. Section 2239 of the Code states:

17 “(a) The use or prescribing for or administering to himself or herself, of any
18 controlled substance; or the use of any of the dangerous drugs specified in Section
19 4022, or of alcoholic beverages, to the extent, or in such a manner as to be dangerous or
20 injurious to the licensee, or to any other person or to the public, or to the extent that
21 such use impairs the ability of the licensee to practice medicine safely or more than one
22 misdemeanor or any felony involving the use, consumption, or self-administration of
23 any of the substances referred to in this section, or any combination thereof, constitutes
24 unprofessional conduct. The record of the conviction is conclusive evidence of such
25 unprofessional conduct.

26 “(b) A plea or verdict of guilty or a conviction following a plea of nolo
27 contendere is deemed to be a conviction within the meaning of this section. The
28 Medical Board may order discipline of the licensee in accordance with Section 2227 or

1 the Medical Board may order the denial of the license when the time for appeal has
2 elapsed or the judgment of conviction has been affirmed on appeal or when an order
3 granting probation is made suspending imposition of sentence, irrespective of a
4 subsequent order under the provisions of Section 1203.4 of the Penal Code allowing
5 such person to withdraw his or her plea of guilty and to enter a plea of not guilty, or
6 setting aside the verdict of guilty, or dismissing the accusation, complaint, information,
7 or indictment.”

8 9. California Code of Regulations, title 16, section 1360, states:

9 “For the purposes of denial, suspension or revocation of a license, certificate or
10 permit pursuant to Division 1.5 (commencing with Section 475) of the code, a crime or
11 act shall be considered to be substantially related to the qualifications, functions or
12 duties of a person holding a license, certificate or permit under the Medical Practice
13 Act if to a substantial degree it evidences present or potential unfitness of a person
14 holding a license, certificate or permit to perform the functions authorized by the
15 license, certificate or permit in a manner consistent with public health, safety, or
16 welfare. Such crimes or acts shall include but not be limited to the following:
17 Violating or attempting to violate, directly or indirectly, or assisting in or abetting the
18 violation of, or conspiring to violate any provision of the Medical Practice Act.”

19 **FIRST CAUSE FOR DISCIPLINE**

20 **(Conviction of a Crime Substantially Related to the
Qualifications, Functions, or Duties of a Physician and Surgeon)**

21 10. Respondent has subjected his Physician’s and Surgeon’s Certificate No. G43511 to
22 disciplinary action under sections 2227 and 2234, as defined by section 2236, of the Code in that
23 he has been convicted of a crime substantially related to the qualifications, functions, or duties of
24 a physician and surgeon, as more particularly alleged hereinafter:

25 11. On or about February 4, 2017 at approximately 0050 hours, San Diego Sheriff’s
26 Department Deputy D.S. was dispatched for a hit and run accident in Encinitas, California.
27 Deputy D.S. pulled over a black Tesla. Respondent was in the passenger seat and Deputy D.S.

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1 later determined that Respondent was the owner of the car. Deputy D.S. smelled the strong odor
2 of alcohol and vomit in the car.

3 12. Deputy D.S. questioned the woman in the driver's seat, who said that Respondent
4 made her switch seats after they had hit the other car. Deputy D.S. spoke to Respondent, and
5 observed that Respondent was slurring his words and there was vomit on his shirt. Respondent
6 told Deputy D.S. that he had been drinking wine that evening and that he had two drinks.
7 Respondent admitted to driving his car. When asked what time it was, Respondent said that it
8 was 1:15 p.m.

9 13. Respondent consented to the standardized field sobriety exercises. During the
10 exercises, Deputy D.S. observed that Respondent's eyes exhibited a lack of smooth pursuit and
11 that Respondent could not keep his balance during the walk and turn and the one leg stand tests.

12 14. Respondent consented to give a sample for a Preliminary Alcohol Screening (PAS).
13 Another deputy administered this screening, and Respondent's breath sample measured at 0.157
14 and 0.162 blood alcohol content (BAC).

15 15. Deputy D.S. spoke to Witness C.N., whose car had been hit by Respondent's.
16 Witness C.N. reported that he had been stopped at a light when his car had been hit from behind
17 by Respondent. Witness C.N. saw Respondent get out of the driver's side of his car and inspect it
18 for any damage. Witness C.N. told Deputy D.S. that he had requested Respondent's insurance
19 information, and Respondent did not comply. Witness C.N. saw the female passenger get into the
20 driver's seat of Respondent's car and Respondent entered the passenger side. Respondent and the
21 woman left in his car.

22 16. Respondent was arrested and provided a blood sample. The reported blood alcohol
23 result for that sample was 0.161.

24 17. On or about February 23, 2017, in *The People of the State of California v. Michael*
25 *Paul Kosty*, San Diego Superior Court Case No. CN370013, Respondent was charged with the
26 following: (1) driving under the influence of an alcoholic beverage, a violation of Vehicle Code
27 section 23152, subdivision (a); (2) driving while having 0.08 percent and more, by weight, of

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1 alcohol in his blood, a violation of Vehicle Code section 23152, subdivision (b); and (3) hit and
2 run driving, a violation of Vehicle Code section 20002, subdivision (a).

3 18. On or about June 22, 2017, Respondent pleaded guilty to one count of a violation of
4 Vehicle Code section 23152, subdivision (b), and was sentenced to five (5) years summary
5 probation, one day of jail with credit for time served, 80 hours of volunteer work, the First
6 Conviction Program, the MADD Program, the standard alcohol conditions, and fines.

7 19. In an interview with Board investigators on or about February 13, 2018, Respondent
8 admitted that he had more than three glasses of red wine and a mixed drink before he was arrested
9 on or about February 4, 2017.

10 **SECOND CAUSE FOR DISCIPLINE**

11 **(Use of Alcoholic Beverages to the Extent, or in a Manner, as to be Dangerous to
Respondent, Another Person, or the Public)**

12 20. Respondent has further subjected his Physician's and Surgeon's Certificate No.
13 G43511 to disciplinary action under sections 2227 and 2234, as defined by section 2239,
14 subdivision (a), of the Code, in that he has used, or administered to himself, alcoholic beverages
15 to the extent, or in such a manner, as to be dangerous or injurious to himself, another person, or
16 the public, as more particularly alleged in paragraphs 11 through 19, above, which are hereby
17 incorporated by reference and re-alleged as if fully set forth herein.

18 **THIRD CAUSE FOR DISCIPLINE**

19 **(General Unprofessional Conduct)**

20 21. Respondent has further subjected his Physician's and Surgeon's Certificate No.
21 G43511 to disciplinary action under sections 2227 and 2234, of the Code, in that he committed
22 general unprofessional conduct, as more particularly alleged in paragraphs 11 through 20 above,
23 which are hereby incorporated by reference and re-alleged as if fully set forth herein.

24 **PRAYER**

25 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
26 and that following the hearing, the Medical Board of California issue a decision:


27 1. Revoking or suspending Physician's and Surgeon's Certificate No. G43511, issued to
28 Respondent Michael Paul Kosty, M.D.;

1 2. Revoking, suspending or denying approval of Respondent Michael Paul Kosty,
2 M.D.'s authority to supervise physician assistants, pursuant to section 3527 of the Code, and
3 advanced practice nurses;

4 3. Ordering Respondent Michael Paul Kosty, M.D., if placed on probation, to pay the
5 Board the costs of probation monitoring; and

6 4. Taking such other and further action as deemed necessary and proper.

7
8 DATED: July 24, 2018


KIMBERLY KIRCHMEYER
Executive Director
Medical Board of California
State of California
Complainant

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